

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VONNELL ORLANDO REED,

Defendant-Appellant.

UNPUBLISHED

July 29, 2010

No. 291405

Wayne Circuit Court

LC No. 08-013391-FH

Before: SHAPIRO, P.J., and SAAD and SERVITTO, JJ.

PER CURIAM.

Defendant appeals by right his bench trial conviction for assault with intent to commit great bodily harm, MCL 750.84. Defendant was sentenced to 6 to 10 years' imprisonment for the conviction. Because defendant has failed to establish that his trial counsel was ineffective, we affirm.

The evidence at trial in this matter established that Darryl Robinson and his then-five-year-old grandson, Keonty O'Neal, drove to the home of the child's godmother, Shanell Reed. While at the home, Robinson drank alcohol, and thus asked Reed to drive them home in Robinson's car. As he sat in the car with O'Neal and Reed's children waiting for Reed, defendant arrived on a bicycle. Defendant approached the passenger side of the car, shook Robinson's hand, and went into the home. A few minutes later, defendant returned and asked Robinson to drive defendant to the store. Robinson told defendant that he could not because he had been drinking. Defendant went back into the house, returned and punched the hood of the car, and walked to the right. Robinson testified that he got out of the car, with the car on his left, looked at the hood of the car and, when he turned to say something to defendant, "that's all I remember." He woke up in the hospital 13 hours later with multiple jaw fractures, other injuries to his face, a fracture in the back of his skull, and injuries to his ribs. O'Neal testified that defendant struck Robinson and then "stomped" on Robinson repeatedly. An investigating officer stated that defendant told him that another person, "Eric", had driven up while defendant was arguing with Robinson, and struck Robinson. Defendant told the officer that Robinson subsequently tried to strike defendant, and defendant admitted that he responded by assaulting Robinson. At trial, defendant continued to maintain that a person named Eric had assaulted Robinson, but defendant denied striking Robinson.

On appeal, defendant contends that counsel was ineffective for failing to investigate this case fully and find the alleged perpetrator Eric in order to substantiate defendant's defense.

Defendant argues that because of the weakness of the prosecution's case, it was imperative to find and interview Eric, or to find other individuals who knew Eric and his proclivity for violence.

Defendant did not move for a new trial on the basis of ineffective assistance of counsel, and failed to request a *Ginther*¹ hearing before the trial court; therefore, his claim of ineffective assistance is not preserved. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Our review of an unpreserved claim of ineffective assistance of counsel is limited to mistakes apparent on the record. *Id.* at 368. A defendant has waived the issue if the record on appeal does not support the defendant's assignments of error. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000). A claim of ineffective assistance of counsel is a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review a trial court's findings of fact, if any, for clear error, and review the ultimate constitutional issue arising from an ineffective assistance of counsel claim de novo. *Id.*

“Effective assistance of counsel is presumed, and [a] defendant bears a heavy burden of proving otherwise.” *People v McGhee*, 268 Mich App 600, 625; 709 NW2d 595 (2005), quoting *People v Solmonson*, 261 Mich App 657, 663-664; 683 NW2d 761 (2004). “In order to overcome this presumption, defendant must first show that counsel's performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms.” *Id.* “Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel's unprofessional errors the trial outcome would have been different.” *Id.*, quoting *Solmonson*, 261 Mich App at 663-664.

“Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy.” *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). The failure to call witnesses constitutes ineffective assistance only if it deprives defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). “A defense is substantial if it might have made a difference in the outcome of the trial.” *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vac'd in part on other grds 453 Mich 902 (1996). A failure to interview witnesses justifies a finding of ineffective assistance of counsel only when “the failure resulted in counsel's ignorance of valuable evidence which would have substantially benefited” the defendant. *People v Caballero*, 184 Mich App 636, 642; 459 NW2d 80 (1990). A defendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Here, defendant fails to provide any support for his claim. The only evidence that supports defendant's story of the existence of a second attacker is his own testimony. Robinson testified that no one other than defendant, complainant, and the children were around at the time of the attack. The eyewitness did not testify that anyone other than defendant struck Robinson.

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Defendant described the mysterious “Eric” as a family friend, and specifically a friend of his niece. Yet defendant does not provide even the most basic information about Eric, including his last name. Defendant has not provided any other evidence to support his claim that Eric even exists, perhaps, for example, an affidavit by his niece that attests to Eric’s existence. Nor has defendant provided anything that would support his claim that Eric was involved in the attack. Defendant’s claim that Eric would have testified favorably to defendant is highly speculative, as is his claim that other unnamed persons could allegedly attest to Eric’s violent nature, or would have done so had counsel called them as witnesses. Under the circumstances, defendant has failed to provide factual support for his claim, *Hoag*, 460 Mich 6; and has thus failed to show that counsel’s failure to call further witnesses deprived him of a substantial defense.

Affirmed.

/s/ Douglas B. Shapiro
/s/ Henry William Saad
/s/ Deborah A. Servitto